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Attorneys for Plaintiffs, Catlin Underwriting Agencies, Limited

**UNITED STATES DISTRICT COURT
 SOUTHERN DISTRICT OF CALIFORNIA**

CATLIN UNDERWRITING AGENCIES,
 LIMITED,

Plaintiff,

-vs.-

SAN DIEGO REFRIGERATED SERVICES,
 INC. D/B/A HARBORSIDE D/B/A SAN
 DIEGO TERMINALS, PLA-ART
 INTERNATIONAL D/B/A SAN DIEGO
 COLD STORAGE, SAN DIEGO COLD
 STORAGE, INC., MIGUEL CUEVA A/K/A
 MIGUEL TAMAYO, SERGIO
 HERNANDEZ, MARCUS FOODS, INC.,
 and DOES 1 through 100, Inclusive

Defendants.

Case No. 08-CV-0173 WQH (JMA)

**CATLIN'S REPLY AND AFFIRMATIVE
 DEFENSES TO DEFENDANTS'
 COUNTERCLAIM**

CATLIN'S REPLY TO COUNTERCLAIM

Plaintiff, Catlin Underwriting Agencies, Limited ("Catlin"), for its Reply to PLA-ART
 International, Inc. dba San Diego Cold Storage's ("SDCS's") Counterclaim for Declaratory
 Judgment, states as follows:

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I

THE PARTIES

77. PLA-ART International, Inc. dba San Diego Cold Storage ("SDCS") is a California corporation which, at all time relevant, engaged in business as a public refrigerated warehouse operator at 1240 W. 28th Street, National City, California.

REPLY: Upon information and belief, Catlin admits the allegations contained in paragraph 77 of SDCS's Counterclaim for Declaratory Judgment.

78. SDCS is informed that Catlin Underwriting Agencies Limited ("CATLIN") is a company organized under the laws of England engaged in business as a commercial insurers and at all times relevant was authorized to underwrite risks in the State of California.

REPLY: Catlin admits the allegations in paragraph 78 of SDCS's Counterclaim for Declaratory Judgment.

II

JURISDICTION AND VENUE

79. This Court has jurisdiction pursuant to the provisions of 28 U.S.C. § 1332(a)(2) because it is a civil action in which the matter in controversy exceeds \$75,000 exclusive of interest and costs, between a citizen of California or subject of a foreign state, United Kingdom.

REPLY: Catlin admits the allegations in paragraph 79 of SDCS's Counterclaim for Declaratory Judgment.

80. This Court has declaratory judgment jurisdiction over this actual controversy pursuant to the provisions of 28 U.S.C. § 2201, *et seq.*

REPLY: Catlin admits the allegations in paragraph 80 of SDCS's Counterclaim for Declaratory Judgment.

81. Venue in this District is proper pursuant to the provisions of 28 U.S.C. § 1391(a)(1) and (2) because a substantial part of the events or omissions giving rise to the claim occurred in this District.

REPLY: Catlin admits the allegations in paragraph 81 of SDCS's Counterclaim for Declaratory Judgment.

1 86. Between January 1, 2006 and September 30, 2006, Sergio Hernandez leased office
2 space at the National City facility from SDCS.

3 **REPLY:** Catlin lacks sufficient knowledge or information upon which to form a
4 belief as to the truth or falsity of the allegations contained in paragraph 86 of SDCS's
5 Counterclaim for Declaratory Judgment and therefore denies same and demands strict
6 proof thereof. Catlin denies SDCS's incomplete and improper characterization of and
7 improper legal conclusions drawn from the events described in paragraph 86.

8 87. During the time he leased office space at the National City facility from SDCS,
9 Sergio Hernandez was a sales agent for MARCUS.

10 **REPLY:** Catlin lacks sufficient knowledge or information upon which to form a
11 belief as to the truth or falsity of the allegations contained in paragraph 87 of SDCS's
12 Counterclaim for Declaratory Judgment and therefore denies same and demands strict
13 proof thereof. Catlin denies SDCS's incomplete and improper characterization of and
14 improper legal conclusions drawn from the events described in paragraph 87.

15 88. As a sales agent for MARCUS, Sergio Hernandez arranged sales of product stored
16 at the National City facility for storage for MARCUS' [sic] account.

17 **REPLY:** Catlin lacks sufficient knowledge or information upon which to form a
18 belief as to the truth or falsity of the allegations contained in paragraph 88 of SDCS's
19 Counterclaim for Declaratory Judgment and therefore denies same and demands strict
20 proof thereof. Catlin denies SDCS's incomplete and improper characterization of and
21 improper legal conclusions drawn from the events described in paragraph 88.

22 89. As a sales agent for MARCUS, Sergio Hernandez arranged for the delivery of
23 product to the National City facility for storage for MARCUS' [sic] account.

24 **REPLY:** Catlin lacks sufficient knowledge or information upon which to form a
25 belief as to the truth or falsity of the allegations contained in paragraph 89 of SDCS's
26 Counterclaim for Declaratory Judgment and therefore denies same and demands strict
27 proof thereof. Catlin denies SDCS's incomplete and improper characterization of and
28 improper legal conclusions drawn from the events described in paragraph 89.

1 90. As a sales agent for MARCUS, Sergio Hernandez inspected inbound and outbound
2 product stored at the National City facility for MARCUS' [sic] account.

3 **REPLY: Catlin lacks sufficient knowledge or information upon which to form a**
4 **belief as to the truth or falsity of the allegations contained in paragraph 90 of SDCS's**
5 **Counterclaim for Declaratory Judgment and therefore denies same and demands strict**
6 **proof thereof. Catlin denies SDCS's incomplete and improper characterization of and**
7 **improper legal conclusions drawn from the events described in paragraph 90.**

8 91. As a sales agent for MARCUS, Sergio Hernandez often received MARCUS' [sic]
9 product from SDCS National City facility and delivered product, in his own vehicle, to
10 MARCUS' [sic] customers or made arrangements directly with the customers for the customers to
11 come to the National City facility to pick up product and MARCUS knew this fact.

12 **REPLY: Catlin lacks sufficient knowledge or information upon which to form a**
13 **belief as to the truth or falsity of the allegations contained in paragraph 91 of SDCS's**
14 **Counterclaim for Declaratory Judgment and therefore denies same and demands strict**
15 **proof thereof. Catlin denies SDCS's incomplete and improper characterization of and**
16 **improper legal conclusions drawn from the events described in paragraph 91.**

17 92. As a sales agent for MARCUS, Sergio Hernandez had unrestricted access to the
18 product stored for MARCUS' [sic] account at the National City facility and MARCUS knew this
19 fact.

20 **REPLY: Catlin lacks sufficient knowledge or information upon which to form a**
21 **belief as to the truth or falsity of the allegations contained in paragraph 92 of SDCS's**
22 **Counterclaim for Declaratory Judgment and therefore denies same and demands strict**
23 **proof thereof. Catlin denies SDCS's incomplete and improper characterization of and**
24 **improper legal conclusions drawn from the events described in paragraph 92.**

25 93. On or before August 8, 2006, pursuant to a request from MARCUS, SDCS
26 conducted a physical inventory of all MARCUS' [sic] product SDCS had in storage at the
27 National City facility.

28

1 **REPLY:** Catlin lacks sufficient knowledge or information upon which to form a
2 belief as to the truth or falsity of the allegations contained in paragraph 93 of SDCS's
3 Counterclaim for Declaratory Judgment and therefore denies same and demands strict
4 proof thereof. Catlin denies SDCS's incomplete and improper characterization of and
5 improper legal conclusions drawn from the events described in paragraph 93.

6 94. In September 2006, MARCUS made a written demand on SDCS for the alleged
7 value of product which, according to MARCUS, Sergio Hernandez had removed from the
8 National City facility and delivered to one of MARCUS' [sic] customers without MARCUS' [sic]
9 consent, authorization of knowledge and without any payment to MARCUS for the product
10 ("Released Product").

11 **REPLY:** Upon information and belief, Catlin admits the allegations contained in
12 paragraph 94 of SDCS's Counterclaim for Declaratory Judgment.

13 95. SDCS rejected MARCUS FOODS' [sic] demand for payment and denied it was
14 liable to MARCUS FOODS for the Released Product Sergio Hernandez had removed from the
15 National City facility.

16 **REPLY:** Upon information and belief, Catlin denies the allegations contained in
17 paragraph 95 of SDCS's Counterclaim for Declaratory Judgment.

18 96. Similarly, SDCS rejected MACUS' [sic] subsequent demands for payment relating
19 to the alleged Released Product.

20 **REPLY:** Catlin lacks sufficient knowledge or information upon which to form a
21 belief as to the truth or falsity of the allegations contained in paragraph 96 of SDCS's
22 Counterclaim for Declaratory Judgment and therefore denies same and demands strict
23 proof thereof. Catlin denies SDCS's incomplete and improper characterization of and
24 improper legal conclusions drawn from the events described in paragraph 96.

25 97. During September 2006, MARCUS provided a Memo of Understanding to SDCS
26 purportedly executed by Alberto Sanchez, the owner of Del Rancho Foods in which Mr. Sanchez
27 agreed to assume certain debt obligations to MARCUS, including an obligation to pay MARCUS
28

1 for "[A]pproximately \$143,000 of products delivered to me by Sergio Hernandez that was not
2 invoiced by Marcus Food Company, Inc". [sic]

3 **REPLY: Catlin states that the Memo of Understanding is the best evidence of its**
4 **terms, must be read as a whole, and any and everything at variance therewith is denied.**
5 **Catlin denies SDCS's incomplete and improper characterizations of and improper legal**
6 **conclusions drawn from said document. Catlin denies the remaining allegations contained in**
7 **paragraph 97 of SDCS's Counterclaim for Declaratory Judgment.**

8 98. Based on the Memo of Understanding it received from MARCUS and other actions
9 by MARCUS and Sergio Hernandez, SDCS reasonably believed that MARCUS had ratified the
10 actions of its sales' [sic] agent Sergio Hernandez and that MARCUS would not pursue any claim
11 against SDCS for the Released Product.

12 **REPLY: Catlin denies the allegations contained in paragraph 98 of SDCS's**
13 **Counterclaim for Declaratory Judgment.**

14 99. SDCS's reliance on the Memo of Understanding to form the belief that MARCUS
15 would not pursue a claim against SDCS for Released Product was reasonable under the
16 circumstances.

17 **REPLY: Catlin denies the allegations contained in paragraph 99 of SDCS's**
18 **Counterclaim for Declaratory Judgment.**

19 100. On May 10, 2007, MARCUS filed suit against SDCS, Sergio Hernandez and others
20 seeking damages for the alleged unauthorized release of the Released Product. A copy of Marcus'
21 Complaint is attached as Exhibit "C" to CATLIN's complaint.

22 **REPLY: Catlin admits the allegations contained in paragraph 100 of SDCS's**
23 **Counterclaim for Declaratory Judgment.**

24 101. In paragraph 8 of its Complaint, MARCUS admitted that the storage contract
25 between MARCUS and SDCS consists of the terms and conditions contained in SDCS' Non-
26 Negotiable Warehouse Receipt.

27 **REPLY: Catlin states that the Marcus Foods Complaint is the best evidence of**
28 **its terms, must be read as a whole, and any and everything at variance therewith is denied.**

1 Catlin denies SDCS's incomplete and improper characterizations of and improper legal
2 conclusions drawn from said document. Catlin denies the remaining allegations contained in
3 paragraph 101 of SDCS's Counterclaim for Declaratory Judgment.

4 102. In paragraph 8 of its Complaint, MARCUS incorporated the terms and conditions
5 of SDCS' [sic] Non-Negotiable Warehouse Receipt.

6 **REPLY:** Catlin states that the Marcus Foods Complaint is the best evidence of
7 its terms, must be read as a whole, and any and everything at variance therewith is denied.
8 Catlin denies SDCS's incomplete and improper characterizations of and improper legal
9 conclusions drawn from said document. Catlin denies the remaining allegations contained in
10 paragraph 102 of SDCS's Counterclaim for Declaratory Judgment.

11 103. In paragraph 13-17 of Count I of its Complaint, MARCUS alleges that SDCS has
12 breached its storage contract with MARCUS.

13 **REPLY:** Catlin states that the Marcus Foods Complaint is the best evidence of
14 its terms, must be read as a whole, and any and everything at variance therewith is denied.
15 Catlin denies SDCS's incomplete and improper characterizations of and improper legal
16 conclusions drawn from said document. Catlin denies the remaining allegations contained in
17 paragraph 103 of SDCS's Counterclaim for Declaratory Judgment.

18 104. In Count II of the Complaint, MARCUS alleged that SDCS and the other
19 defendants converted the Released Products to and for their own use.

20 **REPLY:** Catlin states that the Marcus Foods Complaint is the best evidence of
21 its terms, must be read as a whole, and any and everything at variance therewith is denied.
22 Catlin denies SDCS's incomplete and improper characterizations of and improper legal
23 conclusions drawn from said document. Catlin denies the remaining allegations contained in
24 paragraph 104 of SDCS's Counterclaim for Declaratory Judgment.

25 105. Section 9 of SDCS' [sic] Non-Negotiable Warehouse Receipt is entitled
26 "LIABILITY AND LIMITATION OF DAMAGES" and provides in pertinent part as follows:
27
28

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1 (a) [SCDS] SHALL NOT BE LIABLE FOR ANY LOSS, DAMAGE OR
 2 DESTRUCTION TO GOODS, HOWEVER CAUSED, UNLESS SUCH
 3 LOSS, DAMAGE OR DESTRUCTION RESULTED FROM THE
 4 COMPANY'S FAILURE TO EXERCISE SUCH CARE IN REGARD
 5 TO THE GOODS AS A REASONABLY CAREFUL MAN WOULD
 6 EXERCISE UNDER LIKE CIRCUMSTANCES. COMPANY IS NOT
 7 LIABLE FOR DAMAGES WHICH COULD NOT HAVE BEEN
 8 AVOIDED BY THE EXERCISE OF SUCH CARE.

9 * * *

10 (d) IN THE EVENT OF LOSS, DAMAGE OR DESTRUCTION TO THE
 11 GOODS FOR WHICH THE COMPANY IS LEGALLY LIABLE,
 12 STORER DECLARES THAT THE COMPANY'S LIABILITY SHALL
 13 BE LIMITED TO THE LESSER OF THE FOLLOWING: (1) THE
 14 ACTUAL COST TO THE STORER OF REPLACING OR
 15 REPRODUCING THE LOST, DAMAGED AND/OR DESTROYED
 16 GOODS TOGETHER WITH TRANSPORTATION COSTS TO THE
 17 WAREHOUSE, (2) THE FAIR MARKET VALUE OF THE LOST,
 18 DAMAGED AND/OR DESTROYED GOODS ON THE DATE
 19 STORER IS NOTIFIED OF THE LOSS, DAMAGE AND/OR
 20 DESTRUCTION, (3) 50 TIMES THE MONTHLY STORAGE
 21 CHARGE APPLICABLE TO SUCH LOST, DAMAGED, AND/OR
 22 DESTROYED GOODS, (4) \$0.50 PER POUND FOR SAID LOST,
 23 DAMAGED AND/OR DESTROYED GOODS. PROVIDED,
 24 HOWEVER, THAT WITHIN A REASONABLE TIME AFTER
 25 RECEIPT OF THIS WAREHOUSE RECEIPT, STORER MAY, UPON
 26 WRITTEN REQUEST INCREASE COMPANY'S LIABILITY ON
 27 PART OR ALL OF THE GOODS IN WHICH CASE AN INCREASED
 28 CHARGE WILL BE MADE BASED UPON SUCH INCREASED
 VALUATION; FURTHER PROVIDED THAT NO SUCH REQUEST
 SHALL BE VALID UNLESS MADE BEFORE LOSS, DAMAGE OR
 DESTRUCTION TO ANY PORTION OF THE GOODS HAS
 OCCURRED.

(e) THE COMPANY'S LIABILITY REFERRED TO IN SECTION 9(d)
 SHALL BE STORER'S EXCLUSIVE REMEDY AGAINST
 COMPANY FOR ANY CLAIMS OR CAUSE OF ACTION
 WHATSOEVER RELATING TO LOSS, DAMAGE AND/OR
 DESTRUCTION OF GOODS AND SHALL APPLY TO ALL CLAIMS
 INCLUDING INVENTORY SHORTAGE AS AND MYSTERIOUS
 DISAPPEARANCE CLAIMS UNLESS STORER PROVES BY
 AFFIRMATIVE EVIDENCE THAT COMPANY CONVERTED THE
 GOODS TO ITS OWN USE. STORER WAIVES THE RIGHT TO
 RELY UPON ANY PRESUMPTION OF CONVERSION IMPOSED
 BY LAW, IN NO EVENT SHALL STORER BE ENTITLED TO
 INCIDENTAL, SPECIAL, PUNITIVE OR CONSEQUENTIAL
 DAMAGES. [Bold with capitals in the original.]

1 **REPLY:** Catlin admits that SDCS correctly recites a portion of SDCS's
2 Warehouse Receipt. Catlin states that SDCS's Warehouse Receipt is the best evidence of its
3 terms, must be read as a whole, and any and everything at variance therewith is denied.
4 Catlin denies SDCS's incomplete and improper characterizations of and improper legal
5 conclusions drawn from said document. Catlin denies the remaining allegations contained in
6 paragraph 105 of SDCS's Counterclaim for Declaratory Judgment.

7
8 106. SDCS was served with the MARCUS' [sic] complaint on June 22, 2007 and
9 immediately forwarded the summons and the complaint, with a demand for a defense to plaintiff
10 or its agents.

11 **REPLY:** Catlin states that the Marcus Foods Complaint was served on SDCS.
12 Answering further, Catlin denies the remaining allegations contained in paragraph 106 of
13 SDCS's Counterclaim for Declaratory Judgment.

14 107. Catlin received a notice of the MARCUS' [sic] complaint from SDCS on or before
15 June 26, 2007.

16 **REPLY:** Catlin admits the allegations contained in paragraph 107 of SDCS's
17 Counterclaim for Declaratory Judgment.

18 108. SDCS was required to answer or otherwise plead to the complaint on or before
19 July 23, 2007.

20 **REPLY:** Catlin admits the allegations contained in paragraph 108 of SDCS's
21 Counterclaim for Declaratory Judgment.

22 109. On July 10, 2007 Catlin's agent Christopher Moss sent the following e-mail
23 to SDCS' counsel, Linda Fritz:

24 Thank you for your follow-up and diligence. There is a
25 question as to whether or not MARCUS FOODS [sic] lawsuit
26 triggers coverage under the Warehouse Legal Liability Policy and
27 the insurer must reserve all of its rights under the policy, including
28 the right to deny coverage in its entirety. We are presently
evaluating the coverage situation and hope to have an answer in
that regard before the end of the week.

1 I would like to contact a defense attorney I would choose to
2 use if coverage applies to see if he can take the case. I will make
3 this call in the morning and if he can take the case I would suggest
4 that you would consider him. I will call you after I speak with
him.

5 **REPLY: Catlin states that Mr. Moss's e-mail is the best evidence of its terms,**
6 **must be read as a whole, and any and everything at variance therewith is denied. Catlin**
7 **denies SDCS's incomplete and improper characterizations of and improper legal conclusions**
8 **drawn from said document. Catlin denies the remaining allegations contained in paragraph**
9 **109 of SDCS's Counterclaim for Declaratory Judgment.**

10 110. On July 18, 2007 SDCS retained counsel at its own expense to represent it and its
11 employee, Miguel Cueva, in the MARCUS' [sic] lawsuit since its last communication from Catlin
12 and/or its agent Christopher Moss was July 12, 2007 when Christopher Moss emailed SDCS'
13 Linda Fritz and advised her that he was playing phone tag with the counsel he referred to in his
14 July 7, 2007 email, that Catlin was still "trying to shore up the issue of coverage and whether or
15 not this lawsuit [the Marcus Foods' lawsuit] triggers coverage under the Warehouse Legal
16 Liability policy" and that Catlin "continues to reserve all rights under the policy."

17 **REPLY: Catlin states that Mr. Moss's e-mail is the best evidence of its terms,**
18 **must be read as a whole, and any and everything at variance therewith is denied. Catlin**
19 **denies SDCS's incomplete and improper characterizations of and improper legal conclusions**
20 **drawn from said document. Catlin denies the remaining allegations contained in paragraph**
21 **110 of SDCS's Counterclaim for Declaratory Judgment.**

22 111. On July 26, 2006, Catlin, through its counsel, emailed a letter to SDCS denying it
23 had any duty to defend SDCS but allegedly reserving its right to indemnify SDCS under the
24 Policy in relation to the MARCUS' complaint.

25 **REPLY: Catlin admits the allegations contained in paragraph 111 of SDCS's**
26 **Counterclaim for Declaratory Judgment.**

1 **FIRST COUNTERCLAIM**

2 **(Breach of Contract to Defend)**

3 112. SDCS incorporates by this reference paragraphs 1 through 111, above.

4 **REPLY: Catlin re-asserts and incorporates by reference its allegations in**
 5 **paragraphs 1-76 of its Complaint, as though fully stated herein. Catlin reasserts and**
 6 **repleads its reply to paragraphs 77-111 of SDCS's Counterclaim for Declaratory Judgment**
 7 **here, as though fully stated herein.**

8 113. Paragraph 2(b) of the Policy provides that the [Insurer] agrees:

9
 10 To pay on behalf of the **Insured** those sums that the Insured
 11 becomes legally obligated to pay for **Property Damage** by reason
 12 of liability imposed upon the **Insured** as a warehouse operator or
 13 bailee resulting from an **occurrence** during the certificate period.

14 **REPLY: Catlin admits that SDCS correctly recites a portion of the Policy.**
 15 **Catlin states that the Policy is the best evidence of its terms, must be read as a whole, and**
 16 **any and everything at variance therewith is denied. Catlin denies SDCS's incomplete and**
 17 **improper characterizations of and improper legal conclusions drawn from said document.**
 18 **Catlin denies the remaining allegations contained in paragraph 113 of SDCS's Counterclaim**
 19 **for Declaratory Judgment.**

20 114. Paragraph 2(b) of the policy provides as follows:

21 b. The **Company** has the right and duty, to defend any suit or
 22 other proceedings that may be brought against the **Insured**
 23 to enforce claims, even if such suits or proceedings are
 24 groundless, false or fraudulent. But:

25 (1) **Company** may make such investigation, negotiation
 26 and settlement of any claim or suit as the **Company**
 27 deems warranted whether such claim exceeds policy
 28 deductible or not;

(2) **Company** reserves and shall have the right to select
 defense attorneys and determine reasonable and
 appropriate compensation for those defense attorneys;

(3) **Company's** right and duty to defense shall end when **Company** has paid or tendered the applicable limit of insurance to one or more claimants;

(4) **Company** had no duty to defend the **Insured** against any suit or proceedings seeking damages to which this insurance does not apply.

REPLY: Catlin admits that SDCS correctly recites a portion of the Policy.

Catlin states that the Policy is the best evidence of its terms, must be read as a whole, and any and everything at variance therewith is denied. Catlin denies SDCS's incomplete and improper characterizations of and improper legal conclusions drawn from said document. Catlin denies the remaining allegations contained in paragraph 114 of SDCS's Counterclaim for Declaratory Judgment.

115. Paragraph F, entitled **DEFINITIONS** provides in pertinent part as follows:

3. **Property Damage** means physical loss, damage or destruction to tangible, personal property owned by others in the care, custody or control of the **Insured** while on the **Premises** of the **Insured** and includes loss of use of such property. **Property Damage** includes the reasonable and necessary costs incurred to remove the debris of such property after an **Occurrence**. **Property Damage** includes actual loss of profits not to exceed those profits, which would have been realized from the sale of the lost, damaged or destroyed property. **Property Damage** does not include any other consequential damages including, but not limited to, personal injury, other lost profits, or damage to reputation or goodwill.

4. The term "**Occurrence**", whether employed in this Insurance, is defined as (1) an accident that takes place during the period of insurance under this Certificate, or (2) in the absence thereof, a continuous or repeated exposure to conditions which unexpectedly cause loss or destruction or damage to tangible property during the period of insurance under this Certificate, and all such exposure to substantially the same general conditions existing at or emanating from any one **Premises** specified in the Supplemental Declarations shall be deemed one **Occurrence**.

1 **REPLY:** Catlin admits that SDCS correctly recites a portion of the Policy.
2 Catlin states that the Policy is the best evidence of its terms, must be read as a whole, and
3 any and everything at variance therewith is denied. Catlin denies SDCS's incomplete and
4 improper characterizations of and improper legal conclusions drawn from said document.
5 Catlin denies the remaining allegations contained in paragraph 115 of SDCS's Counterclaim
6 for Declaratory Judgment.

7 116. Catlin failed to conduct a reasonable investigation of the allegations in the
8 MARCUS lawsuit and therefore breached the implied obligation of good faith and fair dealing
9 inherent in every contract under California law.

10 **REPLY:** Catlin denies the allegations contained in paragraph 116 of SDCS's
11 Counterclaim for Declaratory Judgment.

12 117. Had Catlin conducted a reasonable investigation of the allegations in the MARCUS
13 lawsuit, Catlin would have determined that it had a duty to defend SDCS in the MARCUS lawsuit.

14 **REPLY:** Catlin denies the allegations contained in paragraph 117 of SDCS's
15 Counterclaim for Declaratory Judgment.

16 118. Catlin's failure to conduct a reasonable investigation of the allegations in the
17 MARCUS lawsuit constitutes a material breach of the Policy.

18 **REPLY:** Catlin denies the allegations contained in paragraph 118 of SDCS's
19 Counterclaim for Declaratory Judgment.

20 119. Catlin's refusal to defend SDCS in the MARCUS lawsuit is a material breach of
21 Catlin's obligation under the Policy because the claims MARCUS alleged in the MARCUS lawsuit
22 clearly allege an occurrence and property damage under the Policy.

23 **REPLY:** Catlin denies the allegations contained in paragraph 119 of SDCS's
24 Counterclaim for Declaratory Judgment.

1 120. SDCS has substantially complied with all its obligations under the terms of the
2 Policy.

3 **REPLY: Catlin denies the allegations contained in paragraph 120 of SDCS's**
4 **Counterclaim for Declaratory Judgment.**

5 121. As a result of Catlin's breach of its obligations under the policy to conduct a
6 reasonable investigation and to provide SDCS with a defense in the MARCUS lawsuit, SDCS has
7 incurred damages in excess of \$75,000 in attorneys' fees and expenses in defending itself in the
8 MARCUS lawsuit, no part of which has Catlin been reimbursed.

9 **REPLY: Catlin denies the allegations contained in paragraph 121 of SDCS's**
10 **Counterclaim for Declaratory Judgment.**

11
12 **SECOND COUNTERCLAIM**

13 **(Breach of Covenant of Good Faith and Fair Dealing)**

14 122. SDCS incorporates by this reference paragraphs 1 through 121, above.

15 **REPLY: Catlin asserts and incorporates by reference its allegations in**
16 **paragraphs 1-76 of its Complaint, as though fully stated herein. Catlin reasserts and**
17 **repleads its reply to paragraphs 77-121 of SDCS's Counterclaim for Declaratory Judgment,**
18 **as though fully stated herein.**

19 123. Catlin's denial of its duty to defend SDCS in the MARCUS lawsuit is without
20 proper cause and is unreasonable.

21 **REPLY: Catlin denies the allegations contained in paragraph 123 of SDCS's**
22 **Counterclaim for Declaratory Judgment.**

23 124. Catlin's refusal to investigate the allegations in the MARCUS lawsuit is inherently
24 unreasonable.

1 **REPLY: Catlin denies the allegations contained in paragraph 124 of SDCS's**
 2 **Counterclaim for Declaratory Judgment.**

3 125. Catlin's interpretation of the allegations of the MARCIS' lawsuit and/or its
 4 interpretation of the Policy in refusing to defend SDCS in the MARCUS lawsuit is inherently
 5 unreasonable.

6 **REPLY: Catlin denies the allegations contained in paragraph 125 of SDCS's**
 7 **Counterclaim for Declaratory Judgment.**

8 126. At the time Catlin wrongly denied a defense to SDCS, Catlin knew or should have
 9 known the following regarding the allegations in the MARCUS' lawsuit, including, but not limited
 10 to, the following:

- 11 a. That Count I of the MARCUS' lawsuit alleged that SDCS acts and/or
 12 omissions were negligent and therefore constituted an occurrence under the
 13 Policy;
- 14 b. That the produce allegedly released by SDCS without MARCUS'
 15 authorization was perishable and therefore could not have been returned to
 16 Marcus when the alleged unauthorized release of product was learned by
 17 Marcus;
- 18 c. That any release of product without MARCUS' authorization as alleged in
 19 the MARCUS' lawsuit constitutes Property Damage under the Policy;
- 20 d. That the MARCUS' lawsuit does not allege MARCUS sustained a loss
 21 arising out of any processing performed by or on behalf of SDCS;
- 22 e. That the loss alleged by MARCUS in the MARCUS' lawsuit does not
 23 allege an "unexplained loss and shortage of product based upon a
 24 discrepancy between a physical count and a book, computer or other
 25 inventory."
- 26 f. That in refusing to defend SDCS in the MARCUS' lawsuit while reserving
 27 its right to indemnify SDCS in the MARCUS lawsuit, Catlin has explicitly
 28 or implicitly admitted that the MARCUS Complaint alleged facts that
 potentially triggered coverage under the Policy and,
- g. That Catlin did not suffer substantial prejudice as required by law, in order
 to deny coverage for untimely notice.

1 **REPLY: Catlin denies the allegations contained in paragraph 126, including**
2 **subparts a-g, of SDCS's Counterclaim for Declaratory Judgment.**

3 127. Catlin's actions constitute a vexatious and unreasonable refusal to defend SDCS in
4 the MARCUS lawsuit.

5 **REPLY: Catlin denies the allegations contained in paragraph 127 of SDCS's**
6 **Counterclaim for Declaratory Judgment.**

7 128. As a result of Catlin's unreasonable and vexatious refusal to defend SDCS in the
8 MARCUS lawsuit, SDCS has incurred damages in excess of \$75,000 in attorneys' fees and other
9 expenses and SDCS is further entitled to recover punitive damages.

10 **REPLY: Catlin denies the allegations contained in paragraph 128 of SDCS's**
11 **Counterclaim for Declaratory Judgment.**

12
13
14 **CATLIN SEPARATE DEFENSES**

15 Catlin hereby alleges the following Separate Defenses. By alleging the following Separate
16 Defenses, Catlin makes no admission of any kind and does not assume any burdens of proof or
17 production not otherwise properly resting upon it in this matter. Rather, Catlin identifies the
18 Separate Defenses herein to preserve them for all proper uses under applicable law. Catlin has yet
19 to conduct or complete discovery in this matter. As such, Catlin reserves the right to supplement,
20 amend, modify, add or delete defenses after discovery is completed.

21
22
23 **FIRST AFFIRMATIVE DEFENSE**

24 SDCS's Counterclaim for Declaratory Judgment fails to state a claim or cause of action
25 upon which relief can be granted against Catlin.
26
27
28

SECOND AFFIRMATIVE DEFENSE

The loss or damage complained of by SDCS in its Counterclaim for Declaratory Judgment is barred, in whole or in part, by the express terms, definitions, conditions, exclusions and/or other provisions of the Policy.

THIRD AFFIRMATIVE DEFENSE

The Policy is subject to certain deductibles and limits which apply to reduce or limit, in whole or in part, SDCS's compensable damages and costs, if any.

FOURTH AFFIRMATIVE DEFENSE

Coverage for SDCS's claim, if any, is limited by the provisions of the Policy relating to the valuation of a proper claim.

FIFTH AFFIRMATIVE DEFENSE

SDCS's Counterclaim for Declaratory Judgment is barred, either in whole or in part, to the extent that other terms, definitions, conditions, exclusions and/or provisions of the Policy also apply to the alleged damages and costs for which SDCS seeks a recovery in this action and, thus, Catlin expressly reserves the right to assert and rely upon such other terms, definitions, conditions, exclusions and/or provisions of the Policy in the event that such terms, etc. are found to apply following the completion of discovery and trial preparation, or in the event that SDCS further amends, modifies, or otherwise alters its pleading in this matter.

Dated: April 23, 2008

CHRISTENSEN EHRET LLP

By: /s/Jack C. Hsu
 MARK E. CHRISTENSEN, ESQ.
 JACK C. HSU, ESQ.
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 Attorneys for Plaintiff, CATLIN
 UNDERWRITING AGENCIES LIMITED

CERTIFICATE OF SERVICE

Jack C. Hsu, an attorney, does hereby certify service as to the foregoing Catlin's Reply and Affirmative Defenses to Defendant's Counterclaim was accomplished pursuant to ECF as to Filing Users and as to any party who is not a Filing User or represented by a Filing User on this 23rd day of April, 2008.

CHRISTENSEN EHRET LLP

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